ATTORNEY FOR APPELLANT:

TERRY K. HIESTAND
Chesterton, Indiana

ATTORNEY FOR APPELLEE:

DONALD STEPANOVICH
Highland, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE ESTATE OF MORRIS D. SCOTT,	)	
	)	
TERRY K. HIESTAND,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A04-9911-CV-515
	)	
JOHN MICHAEL LACNY,	)	
	)	
Appellee.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-9503-ES-78

October 19, 2000

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATTINGLY, Judge

Terry K. Hiestand was at one time the attorney for John Michael Lacny. Hiestand

prepared a contingency fee agreement whereby he would represent Lacny in an action by Scott's sisters contesting a will that named Lacny as Scott's executor and primary beneficiary. Under the agreement, Hiestand would be paid one-third of the amount ultimately received by Lacny if he and Hiestand were successful in having the will probated. They were successful, the will was probated and Lacny took over as personal representative from Scott's sisters.

Hiestand eventually withdrew as Lacny's attorney because of conflicts over the valuation of property Lacny was selling. Hiestand argues that the probate court abused its discretion in approving the final account to the extent certain estate property was either undervalued or not properly accounted for. We find that the trial court did not abuse its discretion in approving the final account, and we accordingly affirm.

FACTS AND PROCEDURAL HISTORY

Morris D. Scott died on February 21, 1995, and it was believed he had died intestate. Scott's two sisters were appointed co-administrators of his estate. A will was subsequently presented. It had been mutilated to remove the name of a beneficiary that the court determined was Lacny. The sisters objected to the probate of the will because of the mutilation and Lacny hired Hiestand to represent him in his attempt to have the will probated.

The will was probated and the probate court's action was upheld on appeal. Powers v. Lacny, 671 N.E.2d 1215 (Ind. Ct. App. 1996). On January 28, 1997 Lacny took over as

personal representative. Hiestand continued to represent Lacny until October of 1997 when he withdrew as Lacny's counsel and filed objections to Lacny's proposed sale of some real estate. In the document he filed objecting to the sale, Hiestand characterized himself as an "interested party" who was, by virtue of "the assignment of a portion of [Lacny's] interest as an heir of the estate to [Hiestand]," (R. at 87), entitled to object to the sale and to receive copies of all petitions and pleadings subsequently filed by Lacny. More specifically, on appeal Hiestand asserts Lacny 1) failed to properly account for Scott's collection of antique china, which Hiestand claims was worth some $50,000; 2) sold some real estate for less than it was worth; and 3) failed to file certain receipts.

The court overruled Hiestand's objection to the sale and a final account was filed in April of 1998. Hiestand objected to the final account, again alleging some of the assets were undervalued or not properly accounted for. The court accepted the final account and Hiestand appeals.

DISCUSSION AND DECISION

Failure to Account for Scott's Personal Property

Scott was a collector of rare "Flo-Blue" china. Scott's business partner, Richard Carpio, testified that immediately after Scott died, Scott's house contained property including a china collection Carpio valued at $50,555.[1] Some two years later, Lacny assumed control

[1] Hiestand offers two record citations in support of this allegation. Neither of the cited pages includes such testimony or otherwise supports this statement. The first citation, (R. at 51), is to a page in a "Petition to Lease Property" Hiestand prepared when he was Lacny's attorney. The second, (R. at 69), is to Hiestand's "Motion to Correct Errors [sic]." That page in the motion does not address the china or other property in the house. A third record reference, (R. at 367), does direct us to an exhibit introduced during Carpio's testimony that he did effect an inventory of the house and that the value of the contents was $50,555.

of Scott's assets and about a year after that, he submitted his Final Account. The Final Account showed furniture valued at $5,000 and "miscellaneous personal belongings" valued at $2,260 (R. at 129), and it notes that the final balance "includes realty and personalty, $16,978.74 of which [Lacny] can not account for and never was charged with receiving." (R. at 131.)

Although Hiestand's assertion of error on this issue is not a model of clarity, it appears that he suggests that there was personal property that was either intentionally undervalued by Lacny or somehow disposed of by Lacny without having been included in the Final Account.[2] Hiestand points to testimony by Lacny's appraiser as indicating the appraisal reflects low-end "garage sale prices, not high-end, quality, antique shop prices," (R. at 392),[3] and states that the trial court's "failure to acknowledge the deficiencies that occurred with regard to the handling of approximately $50,000 of the Decedent's personal property was apparently the result of the Court's lack of respect for the position of [Hiestand] as an 'interested party' trying to protect his interest in that part of [Lacny's] inheritance which had been assigned to [Hiestand]." (Br. of the Appellant at 13-14.)

Lacny notes that two years had passed between Scott's death and the time when he took control of the property as the personal representative, and that an inventory prepared by

[2] We note that Hiestand offers no legal argument in support of his position. In fact, there is only one citation to case law in Hiestand's entire brief, that citation being to our prior decision resolving the will contest in this same case. All of his arguments on appeal could be seen as waived for failure to provide argument supported by legal authority. *See* Ind. Appellate Rule 8.3(A)(7). Lacny's argument on this issue is also devoid of legal argument or authority. Lacny does not argue that Hiestand's arguments are waived on appeal, and we choose to address Hiestand's allegation of error despite the absence of authority to support it.

[3] The record citations Hiestand offers for this statement are to pages which do not include testimony of any kind and which do not support his position.

Scott's sisters three months after Scott died "did not mention any extravagant Flo Blue china." (Br. of the Appellee at 4.) As a result, there was evidence to support Lacny's final accounting as to the value of the property in Scott's home, and we decline Hiestand's invitation to reweigh it.

Sale of Real Estate[4]

Hiestand asserts as error that Lacny sold for $28,000 a vacant lot[5] Scott had owned "despite the fact that the lot had been previously been [sic] appraised . . . for values ranging from $45,000 to $60,000." (Br. of the Appellant at 14.) Hiestand does not explain why the sale was error, nor does he acknowledge that the record also includes an appraisal indicating the lot was worth $28,000 -- the price for which Lacny sold it. (R. at 120.) Hiestand's

[4] Hiestand's second argument is titled "Appellee Breached Fiduciary Duty in the Valuation and/or Sale of Real Estate." (Br. of the Appellant at 14.) The argument that follows does not mention fiduciary duty nor does it explain why Lacny had such a duty toward Hiestand or how he breached it. That assertion of error is accordingly waived. Lacny characterizes his relationship with Hiestand as that of principals to a contract, and asserts that while Hiestand might be determined to be a creditor of Lacny's, he had no relationship with the estate. So, while Lacny might owe a contractual duty to Hiestand, he does not owe to Hiestand the kind of fiduciary duty an executor owes to a beneficiary or creditor of an estate. This argument, like the others, is virtually devoid of legal authority. Hiestand cites no authority; Lacny's argument includes one citation to *Black's Law Dictionary*.

[5] Hiestand refers to this vacant lot as "8708 Oak in Gary, Indiana." (Br. of the Appellant at 14.) It is apparent from Hiestand's own citations to the record that the 8708 Oak property was a different parcel on which was located a house where Lacny lived for a time. The vacant lot to which Hiestand appears to be referring is a parcel at 8701-8707 Pine Avenue in Gary.

argument can thus only be seen as an invitation to reweigh the evidence before the trial court and we again decline his invitation.

Hiestand also asserts, without explanation or citation to authority, that Lacny undervalued a house Scott had owned located at 8708 Oak St. in Gary. Because this allegation of error is not supported by cogent argument we are unable to address it on appeal.

Receipts

Finally, Hiestand asserts, again without explanation or citation to authority, that Lacny "did not file the receipts required by I.C. 29-1-16-4 or any supporting itemization for the disbursements of $22,673 for which he claimed credit in his Final Account for 'repairs made to 8708 Oak'." (Br. of the Appellant at 15.) Indiana Code § 29-1-16-4 provides in part that:

> When an account is filed, the personal representative shall also file receipts for disbursement of assets made during the period covered by the account. Whenever the personal representative is unable to file receipts for any disbursements, the court may permit him to substantiate them by other proof.

Assuming Lacny's expenditures are considered as "disbursement of assets" for purposes of this code section,[6] Lacny provided to the trial court a four-page "Order to Make Repairs" letter from the City of Gary detailing a list of violations and repairs necessary to bring the house into compliance. Beside each listed violation is a handwritten notation indicating the cost of the repair and in most cases the name of the contractor who performed the repairs. Lacny was asked at trial by Hiestand's counsel "do you have receipts and canceled checks for all of those expenses that you spent on the house?" (R. at 461.) Lacny replied that he

[6] Neither "disbursement" nor "assets" is defined in the probate code and Hiestand offers no explanation why the money spent to repair the property is covered by this section.

did, and Hiestand's counsel said "I don't want to see them all right now. I think we can get copies of those." (*Id.)* Lacny offered sufficient "other proof" to substantiate the disbursements and we decline to reweigh the evidence that was before the trial court.

Hiestand's Interest in the Estate

Though neither party offers argument on the significance of this matter, we are concerned that the trial court's decisions throughout this litigation appear to have been influenced by the contingent fee agreement that the court considered improper and by the fact that Lacny, the personal representative, was also the sole heir. See, for example, R. at 298-300:

> THE COURT: [Y]ou're telling me you want a fee based on a contingent fee basis?
>
> MR. HIESTAND: Yes.
>
> THE COURT: On the whole administration of this estate?
>
> MR. HIESTAND: Yeah. Not for the administration of his estate or representing him as a Personal Representative, but representing him as a would-be heir to this estate.
>
> THE COURT: On a contingent fee basis?
>
> MR. HIESTAND: Yes.
>
> THE COURT: No way. Okay. Anything else?
>
> MR. HIESTAND: Yeah. I have the evidence with regard to why I'm opposed to the sale of this lot for substantially less than –
>
> THE COURT: You're aware of the rule that all heirs may consent to the sale of real estate for less than its appraised value if they all agree?
>
> MR. HIESTAND: Okay.

THE COURT: That's apparently what he's doing. He's the only heir, you're telling me. Is he?

MR. HIESTAND: Well, I say –

THE COURT: Is he or isn't he?

MR. HIESTAND: Well, I say he's assigned part of his interest to me.

THE COURT: How?

MR. HIESTAND: Because that's the agreement that he and I made.

THE COURT: I won't enforce that. I think it's totally illegal.

The court then approved the sale of the property:

MR. HIESTAND: [T]he Court, as I understand it, has ruled that the property is gonna be sold.

THE COURT: Unless you give me any other reason than what you've stated so far, yeah. So far you told me you had a contingent fee agreement, therefore you're an interested party, therefore you're filing objections. And your objection is what? That he's selling it for less than the appraised value?

MR. HIESTAND: For less than the –

THE COURT: And I already told you what the rule is on that. Any P.R. can sell with the consent of all the interested parties for less, much less, than the appraised value. Do you quarrel with that?

MR. HIESTAND: No.

THE COURT: Well, then I don't see that you have a claim or case if you don't quarrel with that. If he can sell it for whatever he wants, he's the only heir, he's the one that's taking a loss.

MR. HIESTAND: Well, I'm right there with him.

(R. at 304-05.)

Neither party addresses either premise upon which the judge relied.[7] However, it has been long recognized that the administration of an estate should be committed to those who have an interest in the property to be administered, as those who stand to gain from the proper administration of the estate or suffer from the consequences of poor administration will be most motivated to administer the estate correctly. *See* 13 I.L.E. *Executors and Administrators* § 13 (1959). As for the contingent fee agreement, such fees are prohibited in criminal cases and certain domestic relations matters. Such fee agreements appear to be permissible in at least some estate-related proceedings. *See, e.g., Lutz v. Belli*, 516 N.E.2d 95 (Ind. Ct. App. 1987), where we enforced a contingent fee agreement in a will contest. We thus decline to adopt the trial court's characterization of Hiestand's contingent fee agreement as necessarily being "totally illegal" and unenforceable.

We note that a separate action by Hiestand to collect his attorney fees from Lacny is pending. We need not and do not decide whether Hiestand's contingent fee agreement was valid or whether he lacked standing to challenge Lacny's actions in the case before us. It is, however, apparent from the trial record that because the trial court believed the agreement was illegal it was unwilling to accept from Hiestand certain evidence as to why Lacny's actions as personal representative may have been improper and why Hiestand could properly

[7] Hiestand does state in his brief, without elaboration, that he challenged the sale of the vacant lot "as an 'interested party,'" (Br. of the Appellant at 14), and he makes the assertion in his reply brief that his status "as an 'interested party' was not questioned in the Court below." (Reply Br. of the Appellant at 2.) Hiestand notes in the first sentence of the argument section of his original brief that his position that he was an "interested person" was "met with hostility by the Court below." (Br. of the Appellant at 12.)

challenge those actions. For that reason, we instruct the court before which Hiestand has brought his action for attorney fees that any determination of value by the trial court in the case before us arising from its belief regarding the invalidity of the contingent fee agreement is not to have *res judicata* effect nor is it to be considered the law of the case applicable to Hiestand's action for attorney fees.

Affirmed.

DARDEN, J., and BROOK, J., concur.